

**ACCESSING WORKERS' COMPENSATION  
INSURANCE FOR CONSUMER-EMPLOYED  
PERSONAL ASSISTANCE SERVICE WORKERS:  
Issues, Challenges and Promising Practices**

**APPENDIX A.**

**Domestic Service Worker Classification  
Codes by Jurisdiction**

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## **Appendix A: Domestic Service Worker Classifications Codes By Jurisdiction**

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### **0405 Domestic Services<sup>1</sup>**

#### Scope

All employees working as domestic engineers and exclusively in the private residence of employers. Includes cooks, maids, nurses, gardeners, private chauffeurs and messengers.

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Virgin Islands currently is the only jurisdiction using this classification code.

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<sup>1</sup> Source: Government of the Virgin Islands Handbook on Worker's Compensation Insurance.

## **0908 Domestic Workers – Inside – Occasional <sup>2</sup>**

### Scope

Occasional domestic workers are domestic workers who are employed part-time. Any domestic workers employed more than one-half of the customary full-time shall be assigned and rated as a full-time domestic worker.

Code 0908 applies to domestics engaged exclusively in household or domestic work performed principally inside the insured residence. This would include a cook, housekeeper, laundry worker, maid, butler, companion, nurse, and babysitter.

Code 0908 is available for domestic operations described above which are conducted at a commercial farm location.

In regard to maintenance, repair or construction activities, Code 0908 contemplates ordinary and/or minor repair or maintenance by occasional domestic workers. Building maintenance or repair by employees hired only for that purpose shall be assigned to Code 9015 – Buildings, - NOC.

Extraordinary repairs, alterations, new construction, erection or demolition of structures shall be assigned to construction or erection classifications.

Refer to *Basic Manual* Rule 3-C-5-b (Rule XIV-E, 1996 edition), which indicates that the application of the per capita charge is not based on the total number of occasional domestics employed during a policy term but rather on the aggregate time of all domestic workers employed during the policy term.

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Jurisdictions currently using this classification code include: AL, AK, AR, AZ, CO, CT, DE DC, FL, GA, HI, ID, IL, IN, IA, KS, KY, LA, ME, MA (not for personal care workers), MI, MN, MS, MO, NE, NH, NM, NY, NC, OK, PA, RI, SC, SD, TN, UT, VT, VA, and WI.

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<sup>2</sup> Source: 1990-2003 National Compensation Insurance, Inc. *Scopes Manual*.

## **0913 Domestic Workers - Inside<sup>3</sup>**

### Scope

Code 0913 applies to domestics engaged exclusively in household or domestic work performed principally inside of the insured's residence. This would include a cook, housekeeper, laundry worker, maid, butler, companion, nurse and babysitter.

Code 0913 is available for domestic operations described above which are conducted at a commercial farm location. In regard to maintenance, repair or construction activities, Code 0913 contemplates ordinary and/or minor repair or maintenance of the insured's premises or equipment when performed by inside domestic workers. Building maintenance or repair by employees hired only for that purpose shall be assigned Code 9015 – Building – NOC. Extraordinary repairs, alternations, new construction, erection or demolition of structures shall be assigned to construction or erection classifications.

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Jurisdictions currently using this code include: AL, AK, AR, AZ, CO, CT, DE, DC, FL, GA, Guam, HI, ID, IL, IN, IA, KS, KY, LA, ME, MD, MA (not for personal care workers), MI, MN, MS, MO, NE, NH, NM, NY, NC, OK, PA, RI, SC, SD, TN, UT, VT, VA, and WI.

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<sup>3</sup> Source: 1990 – 2003 National Council on Compensation Insurance, Inc. *Scopes Manual*.

## **0909 Domestic Workers – Outside – Occasional – Including Occasional Private Chauffeurs<sup>4</sup>**

### Scope

Occasional domestic workers are domestic workers who are employed part-time. Any domestic worker employed more than one-half of the customary full-time shall be assigned and rated as a full-time domestic worker.

Code 0909 does not apply to any operations conducted at a commercial farm location. In regard to maintenance, repair or construction activities, Code 0909 contemplates ordinary and/or minor repair or maintenance of the insured's premises or equipment when performed by outside domestic workers. Building maintenance or repair by employees hired only for that purpose shall be assigned to Code 9015 – Buildings – NOC. Extraordinary repairs, alterations, new construction, erection or demolition of structures shall be assigned to construction or erection of classifications.

Refer to Code 0908 for occasional inside domestic employees.

Refer to *Basic Manual* Rule 3-C-5-b (Rule XIV-E, 1996 edition), which indicates that the application of the per capita charge is not based on the total number of occasional domestics employed during a policy term but rather on the aggregate time of all occasional domestic workers employed during the policy term.

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Jurisdictions currently using this classification code include: AL, AK, AR, AZ, CO, CT, DE, DC, FL, GA, Guam, HI, ID, IL, IN, IA, KY, ME, MA (add Codes 0912 and 0909 are not applicable to operations at any location where commercial farm operations are conducted), MI, MN, MS, MO, NE, NH, NM, NY (Including Occasional Chauffeurs), NC, OK, PA, RI, SC, SD, TN, UT, VT, VA, WI.

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<sup>4</sup> Source: 1990 – 2003 National Council on Compensation Insurance, Inc. *Scopes Manual*.

## **0912 Domestic Workers – Outside<sup>5</sup>**

### Scope

Code 0912 applies to domestic engaged exclusively in household or domestic work performed principally outside of the insured's residence. This would include persons engaged on certain days for gardening work or work as a part-time private chauffeur.

Code 0912 does not apply to any operations conducted at a commercial farm location.

In regard to maintenance, repair or construction activities, Code 0912 contemplates ordinary and/or minor repair or maintenance of the insured's premises or equipment when performed by outside domestic workers. Building maintenance or repair by employees hired only for that purpose shall be assigned to Code 9015 – Building – NOC. Extraordinary repairs, alterations, new construction, erection or demolition of structures shall be assigned to construction or erection classifications.

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Jurisdictions currently using this classification code include: AL, AK, AR, AZ, CO, CT, DE, DC, FL, GA, HI, ID, IL, IN, IA, KS, KY, ME, MD, MA (add Codes 0912 and 0909 are not applicable to operations at any location where commercial farm operations are conducted), MI, MN, MS, MO, NE, NH, NM, NY (Including Private Chauffeurs), NC, OK, PA, RI, SC, SD, TN, UT, VT, VA, and WI.

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<sup>5</sup> Source: 1990 – 2003 National Council on Compensation Insurance, Inc. *Scopes Manual*.

## **0912-011 Domestic Service and Housekeepers<sup>6</sup>**

### Scope

Applicable only to employees of the insured in private residences engaged in domestic services, such as cooks, maids, baby sitters, attendants, nurses, gardeners, chauffeurs, and their helpers. Also includes, contractors that provide domestic service inside the residence. With regards to maintenance, repair or construction activities. Code 0912 includes ordinary and or minor repairs or maintenance of the facilities or equipment insured when performed by domestic employees under contract solely for this purpose shall be assigned Code 9015. Extraordinary repairs, alterations, new construction, erection or demolition of structures shall be assigned to erection or construction classifications.

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Puerto Rico currently is the only jurisdiction using this classification code.

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<sup>6</sup> Puerto Rico State Insurance Fund Corporation, *Manual of Classifications and Rates For Workers' Compensation Insurance*, July 1, 1999 to June 30, 2000.

## **0918 Domestic Service Workers – Inside – Physical Assistance<sup>7</sup>**

Code 0918 applies to domestics who provide physical assistance in activities of daily living to the elderly or persons who are convalescent, acutely or chronically ill, or physically or mentally disabled.

### Scope

Code 0918 applies to domestics who provide physical assistance in activities of daily living principally inside the insured's residence.

For purposes of assigning Code 0918, physical assistance in activities of daily living shall mean the performance of any one or more of the following functions: physically assisting a household member with walking or using prescribed equipment; physically assisting a household member to take medications prescribed by a physician that otherwise would be self-administered; physically assisting a household member with bowel or bladder needs; physically assisting a household member with bathing, personal hygiene, dressing, or grooming; physically assisting a household member with meal preparation, eating (including tube feeding and special nutritional/dietary needs), and clean-up; physically assisting in transferring a household member in and out of bed; physically assisting in the body repositioning of a household member; motion exercises, and physically assisting a household member with health related needs.

In addition to providing physical assistance with activities of daily living, a domestic worker properly assigned to Code 0918 may also perform functions such as cooking, laundry, shopping, housekeeping, providing transportation or assistance with paperwork and reading.

Code 0918 is available for domestic operations described above that are conducted at a commercial farm location. In regard to maintenance, repair or construction activities, Code 0918 contemplates ordinary and/or minor repair or maintenance of the insured's premises or equipment when performed by a domestic worker. Building maintenance or repair by a domestic worker. Building maintenance or repair by employees hired only for that purpose shall be assigned to Code 9015 – Building – NOC. Extraordinary repairs, alterations, new construction, erection or demolition of structures shall be assigned to construction or erection classifications.

Refer to Codes 0908 and 0913 for those inside domestic workers, part-time or full time, engaged exclusively in household or domestic work without providing any physical assistance in activities of daily living.

Refer to *MA Manual* Rule XIV-E-1, which indicates that the premium basis of Code 0918 is payroll, subject to manual rating. Given the premium basis for Code 0918, Payroll, full-time or part-time employment is not a consideration affecting classification assignment.

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MA currently is the only jurisdiction using this classification code.

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<sup>7</sup> Source: 1990 – 2003 National Council on Compensation Insurance, Inc. *Scopes Manual*.

## **0001 Domestics and Domestic Maintenance – Elective Coverage<sup>8</sup>**

### Scope

Code 0001 applies to full-time employees of the employer's private home or estate. Such employees include both out-servants and in-servants or domestics such as caretakers, watch persons, janitors, chauffeurs, gardeners and other employees engaged solely in the maintenance, operation or care of the property. Out-servants performing operations at a commercial farm are to be separately classified to the appropriate farm classification.

In regard to maintenance, repair or construction activities, Code 0001 contemplates ordinary and/or minor repair or maintenance of the insured's premise or equipment when performed by domestic workers.

Refer to Code 0002 for occasional domestic workers.

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NV currently is the only jurisdiction using this classification code.

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<sup>8</sup> Source: 1990 – 2003 National Council on Compensation Insurance, Inc. *Scopes Manual*.

## **0002 Domestics and Domestic Maintenance – Occasional - Elective<sup>9</sup>**

### Scope

Occasional domestic workers are domestic workers who are employed part-time. Any domestic worker employed more than one-half the customary full-time must be assigned and rates as a full-time domestic worker.

Code 0002 applies to employees of the employer's private home or estate. Such employees include both out-servants and in-servants or domestics such as caretakers, watch persons, janitors, chauffeurs, gardeners, and other employees engaged solely in the maintenance, operation or the care of the property. Out-servants performing operations at a commercial farm are to be separately classified to the appropriate farm classification.

In regard to maintenance, repair or construction activities, Code 0002 contemplates ordinary and/or minor repair or maintenance of the insured's premises or equipment when performed by occasional domestic workers.

Refer to Code 001 for full-time domestic workers.

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NV currently is the only jurisdiction using this classification code.

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<sup>9</sup> Source: 1990 – 2003 National Council on Compensation Insurance, Inc. *Scopes Manual*.

**0910(A) Occasional Private Residence Employees<sup>10</sup>**  
- Per Policy  
*Requires H.O. Underwriting Approval*

Scope

This classification shall not apply to any employee who is covered for workers' compensation benefit on a policy also affording comprehensive personal liability insurance nor any person who is employed by his parent, spouse or child.

Subject to the above paragraph, this classification shall apply to any person who is employed by the owner or occupant of a residential dwelling whose duties are incidental to the ownership, maintenance, or use of the dwelling, including the care and supervision of children, or whose duties are personal and not in the owner or occupant, and who is employed by the employer for less than 52 hours during 90 consecutive calendar days or who earns less than \$100 in wages from the employer during 90 consecutive calendar days. Premium for this classification will be charged at a non-refundable flat rate due and payable on an annual basis.

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CA currently is the only jurisdiction using this classification code.

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<sup>10</sup> Source: CA Workers' Compensation Classification for Private Residence Employees, *SCIF Manual*.

**0913 (A) Private Residence Employees<sup>11</sup>**  
- Per Capita  
Requires H.O. Underwriting Approval

Scope

This classification shall not apply to any employee who is covered for workers' compensation benefit on a policy also affording comprehensive personal liability insurance nor any person who is employed by his parent, spouse or child.

Subject to the above paragraph, this classification shall apply to any person who is employed by the owner or occupant of a residential dwelling whose duties are incidental to the ownership, maintenance, or use of the dwelling, including the care and supervision of children, or who duties are personal and not in the course of the trade, business, profession or occupation of the owner or occupant, and who is employed by the employer for 52 hours or more and who earns \$100 or more in wages from the employer during 90 consecutive calendar days.

Premium for this classification will be calculated based on a per capita charge. The premium for any one employee described above who is employed for a period less than a full year shall be no less than 25% of the annual per capita charge for each such employee, but in any event the total premium due shall be no less than the minimum premium stated in the policy.

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CA currently is the only jurisdiction classification code.

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<sup>11</sup> Source: CA Workers' Compensation Classification for Private Residence Employees, *SCIF Manual*.

## **0913 Private Residences – Inservants, Full-Time<sup>12</sup>**

### Private Residence – Definition

Private Residence as used in this Manual shall mean an establishment consisting of:

A tenement, flat or apartment definitely described as a part of any building if occupied exclusively as a residence by not more than one family.

A building designed for an occupied exclusively as a residence by not more than two families, together with the land upon which it is situated, including barns, stables, garages, and customary outbuildings used for household purposes and provided that no farming or dairying operations are carried on for commercial purposes. If, however, such an establishment comprised a tract of land exceeding five acres and more than five full-time servants are employed (whether inside or outside), it shall be treated as a “private estate.”

The private residence of a physician, surgeon or dentist in which office quarters are maintained for professional purposes (no other portion of the residence except such office being so used) shall qualify as a private residence under these rules.

### In-servants – Definition.

In-servants shall mean all employees by whatever name they may be designated, engaged in household or domestic service whose principal duties are performed inside the residence. The term includes, but is not limited to such employees as cooks. Laundresses, maids, butlers, seamstresses, nurses, companions, governesses, and housekeepers.

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NJ currently is the only jurisdiction using this version of the classification code.

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<sup>12</sup> Source: *New Jersey Workers' Compensation and Employers Liability Insurance Manual*.

## **0912 Private Residences: Out-servant, Full-time<sup>13</sup>**

### Out-servant Definition.

Out-servants shall mean all employees engaged exclusively in household or domestic service whose duties are performed principally outside the residence. The term includes but is not limited to private chauffeurs (not chauffeurs of public or commercial motor vehicles); employees engaged in cultivating flowers, vegetables, or other agricultural products for noncommercial purposes or employees engaged in the care of lawns, shrubs, or grounds surrounding the residences and maintained exclusively for appearance.

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NJ currently is the only jurisdiction using this version of the classification code.

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<sup>13</sup> Source: *New Jersey Workers' Compensation and Employers Liability Insurance Manual*.

## 0910 Occasional Servants<sup>14</sup>

### Scope

The term occasional servant as used in this Manual shall mean all out-servants and in-servants whose employment is not continuous but whose duties are a regular and continuing part of the customary household or domestic duties. This definition applies only where a fair estimate of the time during which an occasional servant is employed is less than 40 hours per week. Under all other circumstances such as servant shall be classified as a full-time servant and rated accordingly. The term "Occasional Servants" includes such employees as a laundress for certain days in the week or a chore person who takes care of the furnace, removes ashes, shovels snow in season or does other work of this character using as much time at frequent intervals as the requirements of the work make necessary.

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NJ currently is the only jurisdiction using this classification code.

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<sup>14</sup> Source: *New Jersey Workers' Compensation and Employers Liability Insurance Manual*.

## 8989 Domestic Workers – Residences<sup>15</sup>

### Scope

Applies to full or part-time domestic workers employed inside or outside a private residence and includes private chauffeurs.

### Scope

This classification is applicable to the following domestic workers:

1. **Inside Domestic Workers:** Domestic Workers-Inside are employees engaged exclusively in household or domestic work performed principally inside the residence. Examples include a cook, housekeeper, laundry worker, maid, butler, companion, nurse and babysitter.
2. **Outside Domestic Workers:** Domestic Workers – Outside are employees engaged exclusively in household or domestic work performed principally outside the residence. Examples include a private chauffeur and a gardener.
3. **Occasional Domestic Workers:** Domestic Workers – Occasional are domestic workers, inside or outside, who are employed part-time. Examples of occasional domestic workers are persons engaged on certain days for gardening, cleaning, laundering, or babysitting.

This is a payroll-based classification and is to be used in lieu of the per capita classifications of 0908, 0909, 0912 and 0913.

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OH and OR currently are the only jurisdictions using this classification code.

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<sup>15</sup> *Source:* 1999-2003 National Council on Compensation Insurance, Inc. *Scopes Manual*.

## **9002 Domestics<sup>16</sup>**

### Scope

Employees engaged in household or domestic work performed principally inside the insured's residence. This would include a cook, housekeeper, laundry worker, maid, butler, companion, or baby sitter. The classification contemplates employees who may perform various services for the private residents. Principal duties pertain to the general operations of the household.

Also contemplated by this classification are those individuals performing home help services or providing personal assistance or home care for persons who are convalescent, aged, or acutely or chronically ill or disabled.

Home services providing principally nursing care by licensed nurses rated separately under 9040.

Does not include farm activities.

Lawn and garden service employees rated separately under 9007.

Commercial janitorial services, cleaning services or contractors providing workers who specialize in cleaning operations only rated separately under 9007.

Group homes for the developmentally disabled rated separately.

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ND currently is the only jurisdiction using this classification code.

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<sup>16</sup> Source: ND Classification Manual.

**0923/0913 Domestic Workers – Residences<sup>17</sup>**

Scope

Employees of commercial nursing services, maid services or companion services, as well as employees whose duties are within the scope of a farm classification shall not be assigned to this classification.

Per capita Basis	0913
Payroll Basis	0923

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TX currently is the only jurisdiction using 0923 and this version of classification code 0913.

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<sup>17</sup> Source: *Texas Workers' Compensation and Employers' Liability Manual*, Effective 3/2001.

## **6510-00 Domestic Servants Employed In or About the Private Residence of a Home Owner<sup>18</sup>**

### Scope

Applies to individuals employed by a homeowner to provide domestic services in the home owner's private residence. This classification includes services such as, but not limited to, cooking, housekeeping, caring for children, running errands, shopping, and transporting members of the household by vehicle to appointments, after school activities, or similar activities.

This classification is subject to the provisions of RCW 51.12.020 – Employments excluded – which states in part: The following are the only employments which shall not be included within the mandatory coverage of this title: Any person employed as a domestic servant in a private home by an employer who has less than two employees regularly employed forty or more hours a week in such employment.” This classification is also subject to the provisions of RCW 52.12.110 which allows the employer to elect optional coverage for domestic servants.

This classification excludes chore services which are to be reported separately in classification 6511; domestic (residential) cleaning or janitorial services which are to be reported separately in classification 6602; and skilled or semiskilled nursing care which is to be reported separately in classification 6110.

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WA State currently is the only jurisdiction using this classification code.

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<sup>18</sup> Source: WA Statutory Authority: RCW 51.16.035 98-18-042 § 296-17-72201, filed 8/28/98 , effective 10/1/98.

## **6511-00      Chore Services<sup>19</sup>**

### Scope

Applies to establishments engaged in providing chore services to private individuals. Chore services performed by the chore workers/home care assistants include, but are not limited to, general household chores, meal planning and preparation, shopping and errands either with or without the client, personal care such as bathing, body care, dressing and helping with ambulating, as well as companionship. Frequently the recipients of service are also available to those who pay privately.

This classification excludes individuals working under a welfare special works training program who are to be reported separately in classification 6505; domestic (residential) cleaning or janitorial services which are to be reported separately in classification 6602; and skilled or semi-skilled nursing care which is to be reported separately in classification 6110.

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WA State currently is the only jurisdiction using this classification code.

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<sup>19</sup> Source: WA Statutory Authority: RCW 51.16.035. 99-18-068 § 296-17-7220, filed 8/31/099, effective 10/1/99.

**8828 Domestics (Light Maintenance), Maids in Private Residence<sup>20</sup>**

Scope

Domestic, Light Maintenance  
Maids in Private Residences

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WV currently is the only jurisdiction using this version of the classification code.

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<sup>20</sup> Source: WV Workers' Compensation Division Classes and Rates Publication, 8/4/03.

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**APPENDIX B.**

**NCCI Workers' Compensation and Employer  
Liability Insurance Policy WC 00 03 12  
(Ed. 4-84):  
Voluntary Compensation and Employers  
Liability Coverage for Residence Employees  
Endorsement**

**VOLUNTARY COMPENSATION AND EMPLOYERS LIABILITY COVERAGE  
FOR RESIDENCE EMPLOYEES ENDORSEMENT**

This endorsement adds Voluntary Compensation Coverage and Employers Liability Coverage to the policy.

"Bodily injury," "business," "residence employee," "residence premises," "you," and "we" have the meanings stated in the policy.

**VOLUNTARY COMPENSATION COVERAGE****A. How This Coverage Applies**

This Coverage applies to bodily injury by accident or bodily injury by disease sustained by your residence employees.

1. The bodily injury must arise out of and in the course of the residence employee's employment by you.
2. The employment must be necessary or incidental to work in the state of the residence premises or a state listed in the Schedule.
3. Bodily injury by accident must occur during the policy period.
4. Bodily injury by disease must be caused or aggravated by the conditions of your residence employee's employment by you. The residence employee's last day of last exposure to the conditions causing or aggravating such bodily injury by disease must occur during the policy period.

**B. We Will Pay**

We will pay an amount equal to the benefits that would be required of you if you and your residence employees were subject to the workers compensation law shown in the Schedule. We will pay those amounts to the persons who would be entitled to them under that law.

**C. Other Insurance**

We will not pay more than our share of benefits and costs covered by this insurance and other insurance or self-insurance. Subject to any limits of liability that may apply, all shares will be equal until the loss is paid. If any insurance or self-insurance is exhausted, the shares of all remaining insurance will be equal until the loss is paid.

**D. Exclusions**

This Coverage does not cover

1. bodily injury arising out of any of your business pursuits.
2. bodily injury intentionally caused or aggravated by you.
3. any obligation imposed by a workers compensation or occupational disease law or any similar law.

**E. Before We Pay**

Before we pay benefits to the persons entitled to them, they must:

1. release you and us, in writing, of all responsibility for the injury or death.
2. transfer to us their right to recover from others who may be responsible for the injury or death.
3. cooperate with us and do everything necessary to enable us to enforce the right to recover from others.

If the persons entitled to the benefits of this Coverage fail to do those things, our duty to pay ends at once. If they claim damages from you or from us for the injury or death, our duty to pay ends at once.

(Ed. 4-84)

**EMPLOYERS LIABILITY COVERAGE****A. How This Coverage Applies**

This Coverage applies to bodily injury by accident or bodily injury by disease sustained by your residence employees.

1. The bodily injury must arise out of and in the course of the residence employee's employment by you.
2. The employment must be necessary or incidental to work in the state of the residence premises or a state listed in the Schedule.
3. Bodily injury by accident must occur during the policy period.
4. Bodily injury by disease must be caused or aggravated by the conditions of your residence employee's employment by you. The residence employee's last day of last exposure to the conditions causing or aggravating such bodily injury by disease must occur during the policy period.

**B. We Will Pay**

We will pay all sums you legally must pay as damages because of bodily injury to your employees, provided the bodily injury is covered by this Employers Liability Insurance.

The damages we will pay, where recovery is permitted by law, include damages:

1. for which you are liable to a third party by reason of a claim or suit against you to recover damages obtained from the third party;
2. for care and loss of services; and
3. for consequential bodily injury to a spouse, child, parent, brother or sister of the injured employee; provided that these damages are the direct consequence of bodily injury that arises out of and in the course of the injured employee's employment by you; and
4. because of bodily injury to your employee that arises out of and in the course of employment, claimed against you in a capacity other than as employer.

**C. Exclusions**

This Coverage does not apply to:

1. bodily injury arising out of any of your business pursuits.
2. bodily injury intentionally caused or aggravated by you.
3. any obligation imposed by a workers compensation or occupational disease law or any similar law.

**D. Other Insurance**

We will not pay more than our share of damages and costs covered by this insurance and other insurance or self-insurance. Subject to any limits of liability that apply, all shares will be equal until the loss is paid. If any insurance or self-insurance is exhausted, the shares of all remaining insurance and self-insurance will be equal until the loss is paid.

**E. Limits of Liability**

Our liability to pay for damages is limited. Our limits of liability are shown in the Schedule. They apply as explained below, regardless of the number of insureds, claims or suits, or persons who sustain bodily injury.

1. **Bodily Injury by Accident.** The limit shown for "bodily injury by accident—each accident" is the most we will pay for damages because of bodily injury to one or more residence employees arising out of any one accident. That limit includes damages for death, care, and loss of services.

2. Bodily Injury by Disease. The limit shown for "bodily injury by disease—coverage limit" is the most we will pay for damages because of all bodily injury by disease to one or more residence employees. The limit shown for "bodily injury by disease—each employee" is the most we will pay for all damages because of bodily injury by disease to any one employee. The limits include damages for death, care, and loss of services.
3. We will not pay any claims for damages after we have paid the applicable limit of our liability under this insurance

**POLICY PROVISIONS**

Voluntary Compensation Coverage and Employers Liability Coverage are subject to the provisions of the policy relating to the defense of suits; payment of claim expenses; duties after loss; waiver or changes of policy provisions; cancelation and nonrenewal; subrogation or recovery from others; assignment or death of the insured; premium; and bankruptcy.

Schedule

- |  |               |                |                          |
|--|---------------|----------------|--------------------------|
| <b>1. Residence Employees</b>                                  | <b>Number</b> | <b>Rates</b>   | <b>Premium</b>           |
| Inservants   |               |                |                          |
| Outservants, including private chauffeurs                      |               |                |                          |
| <b>2. State:</b>   |               |                | Workers Compensation Law |
| <b>3. Limits of Liability for Employers Liability Coverage</b> |               |                |                          |
| Bodily Injury by Accident                                      | \$ _____      | each accident  |                          |
| Bodily Injury by Disease                                       | \$ _____      | coverage limit |                          |
|  | \$ _____      | each employee  |                          |

This endorsement changes the policy to which it is attached and is effective on the date issued unless otherwise stated.

(The information below is required only when this endorsement is issued subsequent to preparation of the policy.)

Endorsement Effective Insured	Policy No.	Endorsement No. Premium \$
Insurance Company	Countersigned by _____	

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**APPENDIX C.**

**Workers' Compensation Law Digests by  
Jurisdiction**

## **Appendix C - Workers' Compensation Law Case Digests By Jurisdiction**

### California

***In Home Supportive Services v. Workers' Compensation Appeals Board***, 152 Cal. App. 3d 720, 199 Cal. Rptr. 697 (3d App. Dist. 1984)

This case involved a worker injured while providing in-home support services designed to enable frail elders and persons with disabilities and sight-impairments to remain in their own homes. The services were provided in a private home but were paid for by a state agency called the In-Home Support Services Program. The State argued that the controlling employment relationship for purposes of workers' compensation coverage was between the recipient of the services and the worker--a relationship that did not include enough wages or hours to require coverage under the California law. The Court found that there was a "dual employment" relationship that included the state agency as an employer, in addition to the recipient as employer. Moreover, the Court called it a concept that has long been recognized in situations of general and special employment where a general employer furnishes an employee to another person with both employers having some right of control during the engagement. The Court found that there was sufficient direction and control by the State to make it at least a dual employer regardless of how the actual payments were made to the worker providing services, (in this case by a state agency although in some cases the state pays the recipient of services directly, who, in turn pays the worker). The Court very strictly construed a statutory exception for limited coverage of domestic service to apply only as to the employment relationship with the recipient of services and not to the employment relationship with the State. The Court found that implicit in the legislative history of the California domestic service exclusion was a legislative purpose to impose the obligation of providing workers' compensation coverage for household domestic employers only when the risk spreading mechanism of insurance is available, as it might be in a case such as this where dual employment could be found.

The Court struggled to find coverage for the injured worker in this case, looking for an employment relationship that would afford that coverage where the relationship between the recipient employer and worker would have been excluded as domestic service.

***McCallister v. Workers' Compensation Appeals Board***, 61 Cal. App. 3rd 524, 132 Cal. Rptr. 527 (1976)

In this often-cited case, the Court found that services provided in a private home solely to care for and wait upon a frail elder and that included no duties in connection with the maintenance or functioning of a household, was not domestic service excluded from coverage under the California Workers' Compensation Act. The Court noted the dearth of authority distinguishing between what it referred to as "the lower echelons of health care services provided in the home to a member of the household." It found that cases such as this each must be determined on their own facts. Based on the record in this case that the Court characterized as showing that the injured worker performed only those duties directly related to the care and comfort of the frail elder and not to the general operation and maintenance of the household, the Court held that the exclusion for "household domestic service" did not apply.

This case draws a distinction between services provided for an individual within a household as opposed to services provided to the household in general. While the latter might be excluded as

"household domestic service," by state workers' compensation hearing officers while the former are not.

However, it should be noted that domestic service employment classifications described in Appendix B and used by states do not distinguish between services provided to one or all of the individuals residing in or around a private residence. Thus, one could argue the basis of the decision in *McCallister v. Workers Compensation Appeals Board* and other similar cases (*Viola v. Workmen's Compensation Appeal Board*, 549 A.2d 1367,121 Pa. Commw. 47 (1988) saying that both should have qualified under the classification of domestic service.

***Bonnette v. California Health and Welfare Agency***, 704 F. 2d 1465 (Ninth Cir. 1982)

This federal court decision involved the employment relationship and minimum wage requirements where state and county agencies provided domestic in-home services to aged, the blind and the disabled enabling them to remain in their own homes. The Court found that the agencies exercised considerable control over the nature and structure of the employment relationship along with complete economic control and, hence, were held to be employers for purposes of minimum wage requirements. This was not altered by the fact that the agencies delegated to the recipients of the services various employer responsibilities; that merely made them joint employers. This is similar to the logic that applied in the *In-Home Support Services* decision discussed earlier where "dual employment" led to a finding of coverage under the state workers' compensation system.

Cases like this illustrate the use of liberal construction of a statute in order to achieve beneficent effects of a statutory scheme.

***Bue v. Workers' Compensation Appeals Board***, 43 Cal. Comp. Cas 396 (3rd App. Dist. 1978)

This case involved a daughter injured while lifting her invalid mother from a wheelchair. The Workers' Compensation Judge concluded that lifting the wheelchair was incidental to the daughter's performance of normal routine domestic services and therefore she was not an employee entitled to workers' compensation benefits. The reviewing Court upheld the Workers' Compensation Judge's decision.

#### Colorado

***Melnick v. Industrial Commission of the State of Colorado***, 656 P. 2d 1318 (Colorado Ct. of Appeals, Div. Two 1982)

This case involved penalties imposed under the Colorado Workers' Compensation Act when a household employer failed to file a notice of contest or admission of coverage when notified that a nurse's aide was injured while performed services for the household employer's wife. The Court upheld the hearing officer's determination that the injured aide was covered by the Workers' Compensation Act and which penalties were appropriate. The Court held that the hearing officer's finding that the injured nurse's aide was an employee rather than an independent contractor was supported by the evidence. The hearing officer had found that the nurse's aide was not a licensed professional nurse, she was paid an hourly wage, there was no contract regarding duration of services and the family hired her and continually gave her instructions.

#### Connecticut

***Smith v. Yurkovsky***, Case No. 4324 CRB-3-00-12, Conn, WC Comm. Comp. Rev. Bd (Dec. 2001).

This case involved a worker injured while providing nursing services in a private home. At issue was an exclusion from the definition of employee in the Connecticut workers' compensation law for "any person working in a private residence provided he is not *regularly employed* by the owner or occupier over 26 hours per week." Under the facts of the case, the injured worker's hours per week varied during the course of the year. Some weeks her hours exceeded 26; while other weeks she did not. The Compensation Review Board found that an average of hours worked over the 26 weeks prior to the date of injury should be used to determine whether the threshold was reached. In the absence of a statutory definition of "regularly employed" the Board reasoned that the legislature introduced the works "regularly employed" into the WC law. The Board noted that the term must be given meaning that allows employers to predict when WC insurance will be necessary – and to do so requires some ascertainable boundaries rather than case-by-case determinations. Otherwise, it would be unfair to household employers trying to determine their legal obligations to provide coverage.

This case emphasizes the important of household employers collecting and maintaining accurate hours worked information for all workers, preferably using a standard time sheet format that is signed by the employer and employee for each time period.

#### Florida

***Smith v. Ford***, 472 So. 2d 1223 (1985, FL 1st Dist. Ct. App.)

The court held that the claimant was ineligible for workers' compensation benefits under the Florida law because she was a "domestic servant in a private home" which is excluded by Section 440.02(13)(c)1.

The deputy commissioner at the administrative level had determined the facts to be that the claimant's normal duties were both domestic and personal care of her employer in a private home. Reversing the lower administrative decision which held that her duties as a "personal or home attendant" at least 50 percent of the time afforded her coverage under the Florida law, the Court in this decision reversed and ruled that the claimant's duties result in her being a domestic servant in a private home, regardless of the mixture of duties which included those of a personal attendant which arguably were non domestic.

The Court cited the intent of the workers' compensation law, as articulated by Larson in his treatise, that the costs be placed on the industry involved and ultimately on the consumer through the medium of insurance, whose premiums are passed on in the cost of the product. Citing Larson, it appeared willing to strictly construe the exclusion from coverage in the Florida law because of the difficulty facing householders in determining whether and to what extent they face liability when directly hiring workers' to perform tasks in their households, as opposed to in their trades or businesses.

#### Maryland

*Nationwide Ins. Co. v. Rhodes*, 732 A. 2d 388, 127 Md. App. 231 (1999) (Exerpt)

The court held that a homeowners insurer had no duty to defend a claim for workers' compensation coverage because the household employer's policy it issued excluded any potentiality for workers' compensation liability. The claim involved a home health aide.

Interestingly, the homeowner's insurer *did* defend the policyholder against a negligence claim for the same injuries brought in tort. However, the insurer refused to defend a workers' compensation claim that ultimately succeeded, the latter claim resulting in coverage under the Maryland Uninsured Workers' Compensation Fund because the household employer did not carry workers' compensation insurance.

The excerpt from this case is instructive insofar as it discusses the many potential areas of coverage for injuries to someone performing domestic services or personal assistance in a private home directly for the household employer. There were potential claims in tort, workers' compensation and contractually under the Medical Payments to Others section of the household employers policy. In this case dealing with a home health aide, coverage was ultimately found under Maryland workers' compensation and, more specifically, in the Maryland Uninsured Workers' Compensation Fund.

This case deals with the obligations of the homeowner's insurer to defend a household employer against a workers' compensation brought by a directly employed home health aide. It was decided *after* it was determined by another court that there was coverage under Maryland workers' compensation so it does not go into any detail about the basis for that underlying finding.

Another interesting sidelight of this case is that it illustrates that, aside from actual liability and coverage, whole cases can involve the liability for the legal costs incurred to determine where that coverage and liability lies. This duty to defend against liability and coverage is a little recognized but very significant coverage afforded in insurance policies. Household employers do not want to incur this cost any more than the cost of insurance or ultimate liability but it should be addressed.

#### Nebraska

*Dunagan v. Folkers*, Nebraska Workers' Compensation Court, Doc: 195 No: 2116, 1996

This decision addressed the issue of whether a "private duty nurse" was a "household domestic servant" and therefore exempt from coverage under the Nebraska Workers' Compensation Act. The Court found that the injured plaintiff devoted most of her time to the special needs of a quadriplegic patient in her private home although some of plaintiff's time was spent performing household tasks such as cleaning, cooking, laundry and child care for another. It also noted that the worker was injured while transferring the patient from her wheelchair, a duty within her function as a nurses assistant. The Court cited the oft-stated rule of construction that the Workers' Compensation Act should be liberally construed, and exceptions strictly construed, in order to obtain the beneficent purposes of the Act. The Nebraska Court looked to decisions in Oklahoma, *Nelson v. Bradshaw*, 791 P.2d 485 (Okl. App. 1990), California, *McCallister v. Workers' Compensation Appeal Board*, 61 Cal. App. 3rd 524, 132 Cal. Rptr. 527 (1976) and Pennsylvania, *Viola v. Workmen's Compensation Appeal Board*, 549 A. 2d 1367 (Penn. 1988) to

find coverage in close factual questions. The Court embraced Larson's treatise argument that "Even if the employment is within a private household, it may be distinguishable from domestic service if its essence is not that of performing household duties, but is rather that of practical nursing--for example, the care of an elderly invalid." The Court was not swayed by the fact that the injured worker was placed in the private home by an agency. Neither was the Court persuaded by the argument that the household employers were not engaged in a "trade, business profession or vocation." Instead, the Court found that they employed several licensed nurses and nurse care providers, withheld taxes and social security, provided vacation time and had an employer ID number; the Court said that they were in the "business of providing the services necessary to maintain [the patient's] quality of life."

It is not surprising that the Court found that the services at issue in this case were more those of a practical nurse than a household domestic servant under the facts presented to it. However, it is somewhat surprising that the Court found that the frail elder and her relative who hired people to care for the frail elder were in a business and, therefore, were required to provide workers' compensation coverage.

*Pettit v. State Of Nebraska Department of Social Services*, 249 Neb. 666 (1996, SC, No. S-94-797)

The issue in this case was whether Donna Pettit, a chore provider of an aged and disabled individuals who received services under the Nebraska Medicaid Waiver Program was an employee of the Nebraska Department of Social Services (DSS) when she injured her lower back while providing chore services. The worker had been engaged to provide personal assistance services by a Medicaid waiver recipient. State DSS staff had informed Pettit that she was an independent contractor and that she would not receive sick leave, vacation leave or insurance. Staff further informed Pettit that the Medicaid waiver recipient was her employer and that she was not covered by workers' compensation. Pettit received an IRS Form W-2 that reflected withholding for FICA by DSS (acting as the recipient's agent under Section 3504 of the IRS code and IRS Revenue Procedure 80-4).

The Workers' Compensation Court found that Pettit did not prove that she was a DDS employee. Upon appeal, the Nebraska Court of Appeals reversed the Workers' Compensation Court and held that, as a matter of law, Pettit was a DSS employee when she was injured (*Pettit v. State* 95 NCA No. 28, case No. A-94-797 (not designated for permanent publication). The Court found that the record failed to reflect that there was a clear inference as to whether Pettit was an employee or an independent contractor when she was injured. It held that there was sufficient competent evidence in the record to support the Workers' Compensation Court's determination that Pettit was not an employee of DSS. The Nebraska Supreme Court reversed the holding of the Court of Appeals.

This case did not address any potential liability due to work place injury for the Medicaid waiver recipient as the common law employer of the chore provider. It only finds that the State is not the employer of the chore worker. Facts in the case include DSS staff informing Pettit that the Poels (Medicaid recipient) were her employer and "boss." In addition, Pettit received an IRS Form W-2 from the State, as employer agent for the Poels not an IRS Form 1099. However, potential liability for the Medicaid recipient related to work place injury appears to be minimal since Missouri workers' compensation law exempts employers with fewer than five workers and employers of domestic service workers from the law. If the worker truly performs only chore-

related duties, he or she would fall under the state's definition of domestic service. However, if the chore worker performed also personal assistance-related tasks, final determination of whether the worker falls under the domestic service employment classification would be based on the results of a workers' compensation claims appeal decision

### Nevada

***Sullivan v. Second Judicial District Court***, 331 P. 2d 602, 74 Nev. 334 (1958, S.Ct.)

This case involved the sole issue of *voluntary* coverage under Nevada Industrial Insurance (that is, workers' compensation insurance) for a nurse employed directly by a household employer. More specifically, the case concerned voluntary coverage for two nurses when the household employer had voluntarily elected coverage for three domestic servants but failed to elect coverage for the nurses. Did the election for the domestic servants constitute acceptance of the Nevada law for all of the household employer's employees, including the two nurses?

It was admitted in pleadings that the nurses were employees of the household employer and coverage under the Nevada workers' compensation was compulsory as to them. Domestic servants are expressly excluded from the law although an employer can voluntarily elect coverage for them. The Court had to decide whether a voluntary election as to domestic servants (which the household employer in this case made) constituted acceptance of the law as to nurses he also employed directly in his household. Procedurally, this issue had to be resolved to determine whether the claimant nurse could continue to proceed in his action in tort for negligence; under Nevada law, an injured employee can proceed in tort if the employer fails to provide coverage where it is required. The court held that the workers' compensation that was admittedly required for the nurse was *not* accepted by the household employer by virtue of his voluntary election to cover the domestic servants, therefore the nurse could continue to proceed with his tort action against the household employer/employer.

This case illustrates the interplay between the workers' compensation system and the tort system. A finding of exclusion or non-coverage in one can open up remedies in the other for the injured worker and corresponding liabilities for the household employer/employer.

### New Hampshire

***Appeal of Richard Routhier***, 143 N.H. 404, 725 A.2d 665 (NH S. Ct., 1999)

This case involved whether a sole proprietor of a cleaning business was entitled to workers' compensation benefits under mandatory household employers insurance coverage of domestics under the New Hampshire workers' compensation law or, alternatively, under the language of the household employers insurance policy affording the mandatory coverage. The petitioner had been injured when he fell from a ladder after washing an outside window at a private household. The New Hampshire Supreme Court upheld the New Hampshire Compensation Appeals Board decision that the injured plaintiff was not entitled to workers' compensation benefits.

The New Hampshire Supreme Court analyzed the language of RSA 281-A:6, which requires all comprehensive personal liability, tenant's and household employer's insurance policies in New Hampshire provide workers' compensation insurance covering domestics. The petitioner argued that he was a domestic because he was performing household duties and maintenance for a

household employer at the time of his injury. The household employer's insurance carrier responded that the petitioner was not a domestic because he was not an employee of the household employer. Petitioner agreed that he was not an employee but countered that the statute negated the usual statutory requirement that the injured party be an employee. The Supreme Court disagreed with petitioner.

The petitioner caused the Court to look closely at legislative history that demonstrated that at least one state senator assumed that coverage of domestics would extend to "individuals hired on a very short term basis who are injured while working around the house, mowing the lawn, washing windows and so forth." Absent more formal legislative history, however, the Court found that a domestic must be an employee of the household employer to receive workers' compensation benefits. The Court did, however, encourage the legislature to define the term domestic rather than require courts to define it on a case-by-case basis.

The Court also analyzed the language of the household employer's insurance policy. It found that the policy language, like the statute itself, required that the injured party be an employee in order to receive workers' compensation coverage. The petitioner did not contest that he was not an employee of the household employer so there was no coverage.

#### New York

*McCrorry v. Thomas*, 40 Misc. 2d 904, 244 N.Y.S. 2d 111 (S. Ct., Kings County 1963)

This case involved injury to a licensed practical nurse while rendering services in a private home. The Court dismissed the injured LPN's claim based on failure to provide workers' compensation coverage because there was no evidence that the relationship of master-servant existed which is a pre-requisite to coverage under the Act. Quoting another New York decision, it said "a trained nurse called in on a special case is not in the service or the servant of the employer. She is a professional person like a physician, employed to exercise her calling to the best of her ability according to her own discretion." This case points out the critical distinction in employment relationship that can arise when the injured party is operating under a professional license.

#### Oklahoma

*Nelson v. Bradshaw*, 791 P. 2d 485, 1990 Ok. Civ. App. 29 (1990)

This case involved an injured worker who testified that she was hired to provide services to an individual in his home "in a nursing capacity" despite the fact that she also performed incidental household chores. The Court found that out of state legal authority was both scarce and in conflict on the issue of whether a nurse such as the injured worker in this case was a domestic servant. The Oklahoma Court did not think that the Oklahoma legislature contemplated a person engaged in practical nursing for which a professional license is required to be the same as a domestic servant. Noting that any employment is covered under the Oklahoma Workers' Compensation Act unless it is specifically excluded, the Court found that the claimant's employment as a private or practical nurse was not excluded by the Oklahoma Workers' Compensation Act exception for domestic servants.

#### Oregon

***Gunter v. Mersereau***, 7 Ore. App. 470; 491 P. 2d205 (Ore. App. Ct., 1971)

This appeal, in the words of the Court, raised the sole issues of whether a person employed to care for an invalid in the invalid's home comes within the exclusion from workmen's compensation coverage for "domestic servants." The injured worker cared for a stroke victim who required round-the-clock care involving food preparation and clean-up, administration of medication, and assistance with bathing, dressing and transferring. The worker injured her back while transferring the person from her wheelchair. The Court rejected the claimant's argument that she was not a domestic servant because domestic service connotes care of the home rather than the person. In addition, the Court rejected the claimant's argument that occasional administration of medication changed the nature of her duties to those of a nurse's aide rather than a domestic servant. "The true test is the nature of the work actually done" said the Court as it affirmed the lower court holding that the domestic servant exclusion applied to her based on the work she actually performed so that coverage was denied.

***Kerns v. Guido-Lee***, 813 P. 2d 578, 107 Or. App. 721 (1991)

At issue in this case was the exclusion from Oregon workers' compensation of a housekeeper employed by a referral service under a former version of the Oregon law that excluded domestic servants without qualifying the nature of the employer. The housekeeper was paid by the household employers but paid a portion of the money to the employer agency that was the defendant in this case.

The Court strictly construed the statutory exclusion that applied at the time, noting that the Oregon legislature had limited the exclusion for agricultural workers with the phrase "in or about the private home of the person employing the worker," whereas the domestic servant exclusion had no similar qualifier. The Court concluded that the legislature clearly intended that the exclusion for domestic servants apply to the entire class of workers regardless of the identity of their employer.

As noted above, the Oregon legislature later amended the domestic servant exclusion of apply only to service "by private employment contract." As in the case described in the digest above, presumably the outcome of this case would be different if it arose under the new statute.

***Matter of Lewis***, WCB Case No. 91-10026 (Oregon Workers' Compensation Board, 1992)

This administrative decision by the Oregon Workers' Compensation Board followed the reasoning in *Kerns v. Guido-Lee*, 813 P. 2d 578, 107 Or. App. 721 (1991) and held that a former Oregon workers' compensation law exclusion for a "domestic servant in or about a private home" applied because of the nature of the work regardless of the identity of the persons arranging for, supervising, controlling or benefiting from the service. The underlying facts are not fully developed in the reported decision, however, a footnote alludes to the injured claimant as one who "works for an employer engaged for profit in the business of housekeeping." One can infer from this description, that the injured worker was employed by a housekeeping agency, not directly by the household employer. The Board concluded that the nature of the employer was irrelevant to the exclusion and the employee was excluded from workers' compensation because of the nature of the work as a domestic servant in a private home.

This a very strict and draconian reading of the then-applicable Oregon statute. One gleans from Larson's treatise that the domestic service exclusion *is* designed to protect the household employer who directly employs help in his/her home rather than the agency that employs and places employees in private homes for a fee.

Note that the applicable provision of the law (ORS Section 656.027 (1)) was subsequently amended and now defines domestic servant to mean "any worker engaged in household domestic service by private employment contract, including, but not limited to, home health workers." (Underline added.) Presumably, this would change the result in a case involving similar facts that arose today.

***McFarland v. SAIF Corporation***, 89 Ore. App. 184; 748 P. 2d 150 (Ore. App. Ct., 1988)

This Court of Appeals decision involved a worker injured while employed as a domestic servant in a household job that she got through the OR Department of Human Resources Division of Senior Services (the "Division"). The Court found that the duties performed were those of a domestic servant – meal preparation and clean-up, assisting the individual with bathing, dressing, eating and positioning in bed – regardless of the claimant's certification as a nurse's aide. The Court also cited a provision in the law applicable at the time that said domestic servants of persons receiving public assistance from the Division were not subject to the State's workers' compensation law even if the workers were paid directly by the Division (as the injured worker was) rather than by the person receiving the services. The Court concluded that the Board had not erred in its underlying decision by denying workers' compensation coverage for the claim.

Pennsylvania

***Viola v. Workmen's Compensation Appeal Board***, 549 A. 2d 1367, 121 Pa. Commw. 47 (1988)

This case involved a worker injured while employed by an individual to care in his home for his wife who was disabled and confined to a wheelchair. The evidence showed that the injured worker did not serve the needs of the household, rather, her duties related solely to the unique needs of the wife who was disabled. In this case, the injured worker was found not to have performed housework nor domestic or maid services. The Court held that because the injured worker's job involved duties similar to a nurse's aide and did not involve household duties, she was not an excluded domestic servant.

The Court struggled to find coverage for the injured worker in this case, looking for an employment relationship that would afford that coverage where the relationship between the recipient employer and worker would have been excluded as domestic service. In a conversation with State Workmen's Insurance Fund (SWIF) staff, she strongly disagreed with the decision of the Workmen's Compensation Appeal Board in this case. She reported that domestic service covers a worker providing chore/personal assistance services to a elder or person with a disability in his/her home, regardless of the work performed for the general household. SWIF staff also reported that the employer was allowed to buy workers' compensation insurance coverage through the SWIF's domestic service exemption policy.

***Dorothy Stock v. Abilities in Motion***, PA Department of Labor and Industry Bureau of Workers' Compensation Claims Settlement (August 20, 2001)

This case is a settlement that involved a program participant of the Pennsylvania Attendant Care Program, a Center for Independent Living (Abilities in Motion) that acts as the fiscal intermediary for the program participant and a personal care worker who reported being injured on the job. Abilities in Motion requires that all program participants participating in the self-directed portion of the PA Attendant Care Program purchase and have a current workers' compensation insurance policy (domestic service exemption policy) for their personal care workers either through a private insurer or the SWIF. Abilities in Motion will not pay any wages to a personal care worker hired by the program participant until a program participant has workers' compensation coverage for his or her workers. The program participant in this case had a current and fully executed workers' compensation policy at the time the claimant (Dorothy Stock) reported being injured (back sprain) as a result of assisting the program participant with activities of daily living.

The claimant lived with her father. He owned his own home and had homeowner's insurance. At the time of the injury, the father thought the worker's claim would go against his homeowner's insurance and was afraid his homeowner's insurance would be cancelled as a result of the claim. For some reason, he did not understand that his daughter was fully covered through her own, Domestic Service Exemption Policy obtained through the SWIF.

The claimant retained an attorney and made a claim against Abilities in Motion's workers' compensation policy claiming that the organization was her employer. Abilities In Motion countered this claim by saying it was just the fiscal intermediary for the program participant for payroll purposes and that the program participant was the employer of the claimant. Thus, the claim should be processed against the program participant's executed workers' compensation insurance policy.

Two things went against Abilities in Motion in this decision. First, Abilities in Motion provides direct care services in addition to fiscal intermediary services. As a result, the hearing officer highlighted their direct care employer status. Second, the program participant, on direct examination, reported that she was not her worker's employer even though she directed and controlled all aspects of her workers' activities with the exception of payroll.

The hearing officer then passed over the consumer's executed workers' compensation insurance policy and held that Abilities in Motion was the employer of the claimant for worker's compensation and the claim should be processed against Abilities in Motion's workers' compensation insurance policy. A settlement was agreed to, however, the terms were a bit peculiar. First, the injured worker had to agree to voluntarily resign from employment and execute a document evidencing the worker's intent to resign effective immediately, waiving any rights, remedies and/or causes of action to which the worker may be entitled under the Americans with Disabilities Act. The Agreement also could not be construed as an admission of liability on the part of Abilities in Motion or their insurer. Finally, the claimant had to keep the settlement confidential.

This case emphasizes the need for fiscal intermediaries to clearly define their roles and responsibilities and not to perform any activities that would give the perception that they are the employer of an individual's personal care worker. In addition, individuals enrolled in a self-directed support service program such as the PA Attendant Care Program, and their representatives, should be thoroughly educated regarding their roles and responsibilities related

to the personal care workers they recruit, hire and manage and the workers' compensation insurance coverage they have. Finally, the PA Workers' Compensation Hearing Officers should be educated regarding the role and responsibilities of fiscal intermediaries versus an employer of direct care workers.

***Community Resources for Independence, Erie PA, Settlement with the PA Department of Labor and Industry Bureau of Workers' Compensation, (2001).***

This case is a settlement that involved a program participant of the PA Attendant Care Program, a Center for Independent Living (Community Resources for Independence that acts as the fiscal intermediary for a participant in the PA Attendant Care Program and a personal care worker who reported being injured on the job.

Community Resources for Independence (CRI) requires all program participants participating in the self-directed portion of the PA Attendant Care Program purchase and have a current workers' compensation insurance policy (domestic service exemption policy) for their personal care workers either through a private insurer or the SWIF before CRI will pay any wages to a personal care worker hired by the program participant. The program participant in this case had a fully executed workers' compensation insurance policy. The worker filed a claim against CRI rather than the program participant. The hearing officer, passed over the program participant's workers' compensation policy and allowed the claim to be made against CRI's policy even though CRI made the case that they were the program participant's fiscal intermediary. CRI staff reported that during the hearing the hearing officer did not understand the concept of a fiscal intermediary and the IRS designation of being an agent on behalf of the common law employer (the program participant) and made it clear that he was confused. The hearing officer also demonstrated his bias against persons with disabilities by stating he did not understand how a person with a disability could ever be considered an employer. Finally, CSRI workers' compensation insurance carrier made very little effort to argue CSRI's position. Once again, this case emphasizes the importance of fiscal intermediaries clearly articulating and executing its role and responsibility as the program participant's agent rather than the common law employer of the personal care workers' the program participant recruits and hires directly.

As mentioned in the case above, the Pennsylvania Workers' Compensation hearing officers should be educated regarding the role and responsibilities of Fiscal/Employer Agents versus an employer of personal assistance service workers.

Texas

***Finch v. Texas Employers' Insurance Association, 564 S.W. 2d 807 (5th Dist. Ct. Civ. App., 1978)***

This case involved a workers' compensation award to a paraplegic husband who was injured in the course of his employment. The principal issue was the amount of the award to him for the value of certain nursing services rendered by his wife. A lower court jury had ordered the couple \$25 per month for the wife's nursing services after the insurer refused to pay anything under its original settlement wherein it had agreed to pay all medical and hospital expenses incurred by the husband as a result of his work injury. This court rejected the couple's argument that the lower court jury should have included the value of the wife's usual domestic services in awarding an amount for her nursing services to the husband. This Court upheld the lower court's jury

instruction that permitted the jury to weigh the evidence and determine how much of the wife's services were extraordinary services rendered because of the husband's disability (compensable nursing services) and how much were services usually rendered as part of the marital obligation (non-compensable). This Court could not say that the lower court jury award of \$25 per month was against the great weight and preponderance of the evidence, therefore it affirmed the decision.

This case is interesting insofar as it illustrates the difficulty of determining an appropriate amount to compensate a spouse who provides services to a work-injured spouse. In this case, there was a distinction between extraordinary nursing services and usual domestic services that were viewed as part of a marital obligation.

Note that this case did not involve injury to a person providing domestic service, personal or physical assistance. The injured husband worked on an oil rig. As stated above, the issues in this case revolved around the central issue of the value of certain services provided to him by his wife.

#### Washington State

**Linda J. Bromley**, Docket Nos. 93 3892 & 93 5100; Claim No. N-071072; Washington State Board of Industrial Insurance Appeals (1995).

The injured worker in this case was providing home care service to a frail elder in her private home. The elder was a program participant in the Washington State Medicaid Community Options Entry System (COPES) Program. Under the COPES Program a program participant has the choice to either recruit and hire an individual home care provider or receive services provided by a contracted home agency. The choice of provider is entirely up to the program participant consistent with federal requirements that also require that payment be made directly to the provider. All COPES Program providers sign a written agreement that explicitly states that the contractor is NOT an employee of the Department of Social and Health Services (the "Department") and will not file any claims as a civil service employee, including workers' compensation claims. Nevertheless, the injured worker contended that she was hired and employed by the Department and that would allow her to avoid the domestic service exclusion that would otherwise apply if her employer were the elderly person. The Department contended that it lacked authority to be the injured worker's employer and, alternatively, it did not exercise sufficient control over the injured worker for her to believe that she was an employee of the Department. The Judges found, based on their review of the facts, that the injured worker could not have reasonably believed that she was an employee of the Department. A strongly worded dissent agreed with the outcome, but argued that cases like this should not turn in the belief of the injured worker; rather, they should be decided solely on the basis that the Department lacks statutory authority to become an employer under these circumstances. The majority rejected the dissenting approach and ruled on the basis of the injured worker's reasonable belief about who is the employer, a basis affirmed in the *Odell B. Henderson* case decided by the Board later that same year (see below).

**Odell B. Henderson**, Docket No. 93 4609; Claim No. N-390500, Washington State Board of Industrial Insurance Appeals (1995)

This administrative decision involved the exclusion from coverage under the Washington Workers' Compensation Law for "any person employed as a domestic servant in a private home by an employer who has less than two employees regularly employed 40 or more hours a week in such employment." The injured worker contended that she was employed by the Washington Department of Social and Health Services that would allow her to avoid the domestic servant exclusion. The Judges found that the injured worker's reasonable belief that she was an employee of the state agency was a fact material to the existence of an employment relationship with the state agency. The Judges remanded the case to the hearing process for a factual determination of whether the injured worker's belief was reasonable.

*Everist v. Department of Labor and Industries*, 789 P. 2d 760, 57 Wn. App. 483 (Wash. Ct. of App. Div. Two 1990)

The injured worker in this case worked as an in-home helper for a husband and wife although her primary responsibility was caring for the wife who was disabled. The Court discusses two traditional reasons for excluding domestic servants. These included: 1) where a non-business entity is an employer, as is often the case with domestic service, the assumption that the costs of workers' compensation are passed on to the ultimate consumers of the employer's product fails, and 2) given the variety and number of different types of workers hired by household employers, it would unduly increase the systematic administrative costs and unduly increase the financial and administrative burdens on household employers. The Court cited decisions in other jurisdictions as holding that a person charged with performing domestic duties is a domestic servant even though a significant percentage of the person's activities involve care-taking for a particular individual in the household. The Court liberally applied the state's domestic servant exclusion to find that the injured worker was excluded as a domestic servant because she performed duties traditionally performed by a domestic servant. The Court noted that the holding comports with the reasons mentioned above underlying the domestic servant exclusion.

#### West Virginia

*Weatherford v. Arter*, 135 W. Va. 391, 63 S.E. 2d 572 (S. Ct. of Appeals 1951)

This case concerned a person injured while nursing and attending to a sick husband in a private home. The Supreme Court of Appeals focused on the provision in the West Virginia Act that defines employers as "All persons, firms, associations and corporations regularly employing other persons for the purpose of carrying on any form of industry or business in this State." It found that the terms "industry" and "business" as used in the quoted language relate to an occupation or employment engaged in for the purpose of obtaining a livelihood or for profit or gain, and that neither word embraces or applies to a residence occupied by a person as a home. Therefore, the defendant in the case was not required to provide coverage to the injured worker. The Court said that the purpose of the Workmen's Compensation Statute in West Virginia is to require industry to bear the burden of injury to employees and the conduct of a home is not industry or business within the meaning of the statute. Although the question of domestic service had been raised in earlier proceedings, it was not addressed in this case.

#### Wisconsin

***Joyce Ambrose (Applicant) v Harley Vandev eer Family Trust (Employer) and Northwestern National Insurance Company (Insurer)***, WI Workers' Compensation Decision, Claim No. 86-39393 (December 14, 1988)

The issue of this case is whether the applicant, Joyce Ambrose, was an "employee" of the respondents, Vandev eer Family Trust or Marine Trust Company within the meaning of section 102.07(4), Stats.

The applicant sustained injuries on December 10, 1983, when she slipped and fell in the home of her sister, who suffered from a disabling disease. In his last will and testament, the applicant's father established the Vandev eer Family Trust, which provides for the continuing care of the applicant's disabled sister. Marine Trust Company was the trustee on December 10, 1983. The applicant attempted to obtain workers' compensation coverage for her fall through Marine Trust Company's Insurance Carrier, Northwestern National Insurance Company.

Neither the statutes nor any Wisconsin case law provides a definition of domestic servant. The Commission concluded that a reasonable interpretation of the term "domestic servant" would not include an individual who is hired to provide primary care to a person with a disability. The Commission found this to be true even though the primary care giver may assist in the preparation and clean up of meals, because such activities would be incidental to the primary care duties. This interpretation is in accord with the holding of a California Court of Appeals care that addressed a similar issue, ***Mc Callister v. Worker's Compensation Appeals Board***, App., 132 Cal. Rptr., 527 (1976). The Commission also believed it was in accord with a long-standing admonition of the WI Supreme Court that worker's compensation statutes must be liberally construed in favor of including all services that can reasonably be said to come within the statute (See ***Grant County Service Bureau, Inc. v. Industrial Commission***, 25 Wis. 2d 579, 52, 131 N.W. 2d 293 (1964). If the applicant had been hired for the specific purpose of performing regular cooking, cleaning or other duties commonly associated with the meaning of the term "domestic servant," her employment would have come within the exclusion of section 102.07(4), Stats. The Commission believed she was employed exclusively as a primary care giver for her disabled sister, not as a cook, cleaning person or other form of domestic servant. However, it is believed that the Commission missed the fact that the state uses two classification codes (0908 and 0913) for domestic service that specifically include "cook, housekeeper, laundry worker, butler, companion, nurse and babysitter. Companion and nurse services would certainly cover the tasks performed by the applicant but the Commission failed to recognize this.

The question remaining for the Commission was, who was the employer of the applicant, the Vandev eer Family Trust or the sister (e.g., what was the employer – employee relationship)? The primary test used by the Commission for determining the existence of an employer – employee relationship is whether the alleged employer has the right to control the details of the work, and among the secondary test to be considered are: (1) the direct evidence of the exercise of the right of control; (2) the method of payment compensation, (3) the furnishing of equipment or tools for the performance of work; and (4) the right to fire or terminate the relationship (See ***Kress Packing Company v. Kottwitz***, 61 Wis. 2d 175, 182, 212 N. W. 2d 97 (1973). The Commission found that the sister administered her own affairs and at all time she reserved the right to control the details of the applicant's employment. She hired the applicant, arranged for her payment by requesting and authorizing wages from the Trust, and retained the right to terminate the employment relationship. The Trust merely acted as conservator and manager of the trust funds. The Commission found that neither the Trust nor Marie Trust Company was the

applicant's employer. The Commission dismissed the case against Vandever Family Trust and Marine Trust Company. However, this would not preclude the applicant from filing an application naming her sister as the employer.

***Shirley Nickell (Applicant) v. County Kewaunee Other, (Employer) and Firemans Fund Insurance of Wisconsin (Insurer)***, WI Workers' Compensation Decision Claim No. 94064155.

The main legal issue in this case was whether the relationship of employee and employer exists and between which parties (e.g., the applicant and the county or the applicant and the program participant, Ms Kostichka. The domestic service exception would only apply if the applicant's "employer" was Ms Kostichka and not the county.

The record indicated that some eligible program participants under the Community Options Program choose their own personal care workers and then apply to the county for payment. In this case, Ms. Kostichka had chosen the applicant's predecessor but when that worker left, she simply asked the county for a referral. In addition, the applicant herself went to the county to find placement as a personal care worker, and the county required her to be trained, and placed her in assignments with many different eligible program participants over a period of several years, and the county employs individuals to act as supervisor of personal care workers. In addition, the applicant's rate of pay was established by the county, and she was paid, through a fiscal intermediary, from funds it received from the county. The Commission found that while it is true that the personal care workers are paid through a fiscal intermediary, they are paid by a single check with fund the fiscal intermediary receives from the county, regardless of the number of eligible program participants to who the worker provides services. Further the county itself selected the fiscal intermediary for Ms Kostichka and numerous other eligible individuals.

The applicant testified that the county instructed her to do whatever the eligible program participants wanted her to do. Moreover, the county's witness testified that the county would not fire the personal care workers. In addition, the county did not provide equipment or tools to the applicant, though that would hardly be expected under this arrangement.

Finally, the legislature enacted changes to the state unemployment compensation law to establish a statutory scheme designed to exclude counties from the definition of "employer" under unemployment compensation law, while ensuring that unemployment taxes or contributions would be made by fiscal intermediaries on behalf of the eligible program participant (See sections 46.27(5)(I) and 108.02 (13)(k), Stats. Prior to the changes, the Commission consistently concluded that counties were the employers for unemployment purposes, of personal care workers or similar workers providing services to eligible program participants under the Community Options Program. No similar changes have been enacted into the workers' compensation statutes.

This case considers the petition and positions of the parties, and it reviewed the evidence submitted by the Administrative Law Judge (ALJ). Based on its review, the Commission agreed with the ALJ decision that the county is the applicant's employer under sec. 102.07(1), Stats., and that the domestic servant exclusion under sec. 102.07(4)(b), Stats., does not apply. Thus the county is liable for payment of workers' compensation benefits and medical expense.

***Winkler v. Smith***, Claim No. 1998059089, Wis. Labor and Industry Review Commission, (2000).

This administrative decision involved a worker injured in the course of performing various "companion" services for an Alzheimer's patient in the patient's home. The dispositive issue in the Commission's decision was whether the injured worker was an employee as the term was used in the Wisconsin workers' compensation law. Relying on typical employment standards (e.g. direction and control) articulated in *Kress Packaging Co. v. Kottwitz*, 61 Wis. 2d 175 (1973) the Commission found that the worker was an employee and would be covered unless one of two exceptions in the Wisconsin law applied; (1) domestic servant or (2) a person whose employment is not in the trade, business, profession or occupation of the employer, unless the employer opts to voluntarily cover them. Citing dicta in two of its other decisions but with little other discussion, the Commission found that a person providing personal care to a person with a functional disability is not a domestic servant. It went on, however, to find that an invalid or a relative arranging for health care has not developed or established a trade, business, occupation or profession, even if they frequently hired the same individuals to provide the health care. Therefore, the Commission concluded that the injured worker was not an employee and hence was not entitled to workers' compensation coverage.

This case, like the Florida case discussed earlier (*Smith v. Ford*), relies on an exclusion that recognizes the difficulty household employers face knowing when and to what extent they face potential liability if they hire persons to perform services for them in their private homes as opposed to their trades or businesses.

## **Links to Report PDF Files**

### **REPORT FILE**

Accessible at <http://aspe.hhs.gov/daltcp/reports/paswork.pdf>

Flanagan, Susan A. *Accessing Workers' Compensation Insurance for Consumer-Employed Personal Assistance Service Workers: Issues, Challenges and Promising Practices*. June 7, 2004.

### **TABLES FILE**

Accessible at <http://aspe.hhs.gov/daltcp/reports/pasworktables.pdf>

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APPENDIX A: Domestic Service Worker Classification Codes By Jurisdiction

APPENDIX B: NCCI Workers' Compensation And Employer Liability Insurance Policy WC 00 03 12 (Ed 4-84): *Voluntary Compensation And Employers Liability Coverage For Residence Employees Endorsement*

APPENDIX C: Workers' Compensation Law Case Digests By Jurisdiction